U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 September 2007

Case No.: 2006-LHC-1830

OWCP No.: 07-177025

In the Matter of:

D. H.,
Claimant

v.

MASSMAN TRAYLOR JOINT VENTURE
Employer
and

TRAVELERS INDEMNITY COMPANY
Carrier

APPEARANCES:

QUENTIN MCCOLGIN, ESQ.
On Behalf of the Claimant

JENNIFER CORTES POIRIER, ESQ.
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act)[1], brought by D. H. (Claimant) against Massman Traylor Joint Venture (Employer) and Travelers Indemnity Company (Carrier).[2]

[1] 33 U.S.C. §§901-950.

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel.

The only issue presented by the parties for adjudication is whether the Act covered Claimant as he worked on the construction of a bridge over the Mississippi River. On 13 Sep 06, Claimant filed a motion for summary decision on that issue of coverage and submitted a statement in support. On 29 Sep 06, Employer filed a cross motion to dismiss based on the same issue. In his reply, Claimant submitted an additional statement describing his duties more fully and completely. Claimant argued that the new bridge was, at least in part, an aid to navigation and that Claimant's work activities were essential to the construction of an aid to maritime navigation. Claimant maintained that he was directly furthering the maritime goals of Employer, thereby satisfying the status requirement. Claimant reasoned that he observed the crane routinely load and unload construction materials from the barge and that he made sure the construction of the bridge met the design specifications. He also argued that the platform was merely a vertical extension of a pier used to load and unload barges, thereby satisfying the situs requirement. Employer responded that the new bridge was not a covered situs because it was is not maritime in character and that Claimant's activities as a rodman did not include anything integral to the loading or unloading of a vessel. Employer argued that even if the new bridge satisfied the situs requirement, Claimant did not have maritime status. Claimant offered a second statement in his reply, now stating that he had maritime status because he provided quality control to the bridge construction process and spent a substantial amount of time inspecting construction material before it was loaded onto barges.

Based on Claimant's submissions, the Court found no genuine issue of fact that: (1) Claimant's duties were simply to aid in the construction of a new bridge, (2) Claimant did nothing integral or central to the loading or unloading of the building materials or any other cargo and was not engaged in loading, unloading, building, or repairing a vessel, (3) Claimant was injured on a bridge and not over navigable waters. Accordingly, the Court determined that there was no genuine issue of material of fact that would allow it to reasonably find Claimant entitled to coverage under the Act's situs and status requirements. Therefore, Claimant's motion for summary decision was denied, Employer's motion for summary decision was granted, and the claim was dismissed.

Claimant then sought reconsideration of the Court's order dismissing his claim. In his reply, to Employer's response to the motion for reconsideration, Claimant provided yet a third statement further discussing his activities as they related to longshoring operations. The motion for reconsideration was granted and the order to dismiss vacated,

[2] Collectively referred to herein as Employer.

based on the court's finding that the supplemental and amended statements offered by Claimant were sufficient to raise a genuine issue of material fact.

On 18 May 07, a hearing was held at which both parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following[3]:

Witness Testimony of
Claimant
Keith Edwards

Exhibits
Claimant's Exhibits (CX) 1-14
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[4]

1. The date, time, place, and circumstances of the accident/incident.
2. That the injury was in the course and scope of employment.
3. That there was employee/employer relationship at the time of the accident.
4. That the employer was properly notified of the injury.
5. The notice of claim was timely filed.
6. There was proper and timely controversion.

ISSUES

The sole issue presented for adjudication is whether claimant's injury occurred at a covered situs and whether he was engaged in longshoring operations which would entitle him to maritime employment status.

[3] I have reviewed and considered all testimony and exhibits admitted into the records. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] JX-1; Tr. 6-22.

FACTUAL BACKGROUND

On 14 Mar 05, Claimant was hired by Employer. He performed survey work for the construction of a bridge over the Mississippi. He also occasionally worked on the concrete dock, where it was his job to collect and organize receipts from truck drivers, and assist his supervisor, Keith Edwards. Truck drivers would deliver concrete to the dock, where Claimant would help monitor the unloading of the concrete onto a barge, which would then deliver it to the shoring towers. Claimant was injured on 4 Apr 05, while surveying on top of an I-beam.

POSITIONS OF THE PARTIES

Claimant maintains that he was injured in an area adjoining navigable waters, that the construction of the bridge aided in maritime navigation, and that he was engaged in maritime employment, fulfilling both the status and situs requirements of the Act.

Claimant argues that at the time of his injury, he was located approximately 200 feet above the water on a river pier designated as primary support for the cable span bridge being constructed, which satisfies the situs requirement. Claimant points out that he was working on a new bridge, which was being constructed to replace an old bridge that was considered a significant navigational hazard.

Claimant also maintains that as part of his job, he was engaged in a number of activities that are traditionally maritime in nature, giving him coverage under the Act. Claimant alleges that he checked and serviced motors at the loading dock, assisted truck drivers in backing up to the hopper, checked the concrete for consistency and suitability of shipment, signaled other participants in the loading process, wet down the concrete buckets, and washed down the hopper. Additionally, Claimant states that he received, signed, and accumulated receipts for concrete deliveries at the loading dock.

Employer argues that Claimant does not fall under the Act as a covered employee because he fails to meet both the status and the situs requirements. Employer contends that Claimant does not meet the situs requirement because he was working on a bridge, which is not listed in the Act as a proper situs for coverage. Employer also disputes that Claimant was involved to any significant degree in the loading process. It argues that Claimant does not meet the status requirement because the majority of his time was spent doing surveying work. Employer argues that the small amount of time on the concrete dock was spent by Claimant signing receipts from the concrete trucks, and other minor tasks that do not amount to maritime employment. Employer concludes that Claimant was involved in the construction of a bridge, which does not come under the Act.

LAW

The Act applies to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker…"[5] whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."[6] The maritime employment provision is commonly referred to as the status requirement and the navigable waters provision is commonly referred to as the situs requirement.[7]

In order to demonstrate coverage under the Act, a worker must satisfy both a situs and a status test, showing that at the approximate time of his injury he was "engaged in maritime employment," and that his injury "occurr[ed] upon the navigable waters of the United States . . ."[8]

In the pre-1972 version of the Act, the situs element covered injuries occurring only "on the navigable waters of the United States (including any dry dock)."[9] Injuries on structures permanently affixed to land, such as piers and bridges, were not considered covered under the Act.[10] The 1972 amendments did not change the coverage of any previously covered individual, unless they were expressly excluded. Because Congress presumed that an employee injured upon navigable waters in the course of his employment had always been covered, and would remain covered, the added status requirement defines only the scope of the landward coverage extended by the 1972 amendments.[11] Bridges are permanently affixed to land, and unlike piers or wharves, are not sites enumerated in the 1972 Amendments.[12]

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[5] 33 U.S.C. § 902(3).
[6] 33 U.S.C. § 903(a).
[7] *See e.g., Gonzales v. Tutor Saliba*, BRB Nos. 05-0406, 05-0406A (October 26, 2005).
[8] *Munguia v. Chevron U.S.A. Inc.*, 999 F.2d 808, 810 (5th Cir.1993) (internal citations omitted).
[9] 33 U.S.C. §903(a) (1970).
[10] *Nacirema Operating Co. v. Johnson*, 396 U.S. 347 (1969).
[11] *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983).
[12] *Gonzales v. Tutor Saliba*, BRB Nos. 05-0406, 05-0406A (October 26, 2005).

Generally, circuits are split as to whether bridge builders are covered under the Act.[13] In deciding whether there is coverage, courts decide if a bridge worker was working to aid navigation[14] or directly involved in the loading/unloading of a vessel at the time of injury[15].

While the Act covers the employees it specifically mentions, such as longshoremen and harbor workers, some courts have extended it to other employees.[16] A construction worker employed in building a bridge over navigable water that benefits both highway traffic and river navigation has been found to be engaged in maritime employment within the meaning of the Act.[17] However, "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel."[18]

The current status test presents a dual inquiry. An employee may be engaged in maritime employment if he was injured in the course of his employment while on navigable waters. If he was not on navigable waters at the time of his injury, however, he may satisfy the status test only if his work "is directly connected to the commerce carried on by a ship or vessel,[19] bearing a relationship to the loading, unloading, building or repairing of a vessel.[20] In applying the status test the relevant factor is employee's assigned duty rather than the duty he was performing at the moment of injury.[21] There is no set percentage of time spent in loading or unloading activities for an employee to obtain status. An employee must engage in longshoring operations at least some of the time[22] and momentary and episodic longshore work will not be sufficient to qualify as maritime employment.[23]

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[13] *Crapanzo v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996) (bridge worker not covered); *Pulkoski v. Hendrickson,*28 BRBS 298 (1994) (bridge worker not covered); *Johnsen v. Orfanos Contractors, Inc.*,25 BRBS 329 (1992) (bridge worker not covered) ; *LeMelle v. B.F. Diamond Const. Co.*, 674 F.2d 296 (bridge worker covered); *Gilliam v. Wiley N. Jackson Co.* 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), cert. denied, 459 U.S. 1169 (1983) (bridge worker covered); *Walker v. PCL Hardaway/Interbeton,* 34 BRBS 176 (2000) (bridge worker covered).

[14] *LeMelle* 674 F.2d at 298 ("The Claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment, and is therefore an employee within the meaning of the Act." ; *Compare with Pulkoski 28 BRBS 298* ("…the lower clearance of the bridge in the case at bar made the canal less navigable. Accordingly, Claimant's employment in no way aided navigation…")

[15] *Johnsen,* 25 BRBS at 331 ("…Claimant was not a harbor worker or engaged in maritime employment because Claimant's bridge maintenance work is not related to the loading, unloading, repairing, breaking or building of a vessel.")

[16] *Id.*

[17] *LeMelle* , 674 F.2d 296.

[18] *Munguia,* 999 F.2d at 810 (*citing Chesapeake & Ohio R.R. v. Schwalb,* 493 U.S. 40, 45 (1989)).

[19] *Id*. at 811 (internal citations omitted).

[20] *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994).

[21] *Herb's Welding, Inc. v. Gray*, 470 U.S. 414; *P.C. Pfeiffer*, 44 U.S. 69.

[22] *Caputo*, 432 U.S. at 273; *Boudloche v. Howard Trucking Co.,,Inc.*, 632 F.2d 1346 (5th Cir. 1980).

[23] *Alcala v. Director, OWCP* 141 F.3d 942; *Dorris v. Director, OWCP* 808 F.2d 1362; *Lewis v. Sunnen Crane Serv., Inc.*, 31 BRBS 34.

EVIDENCE AND ANALYSIS

Claimant testified at trial in pertinent part that:[24]

He is not an engineer, but holds a two-year Associates Degree in drafting and design. He became a surveyor because when he was 18 and living in the Mississippi Delta, where there was frequent construction work. He has no formal training in surveying and learned how to survey on the job.

He began working for Employer on 14 Mar 05 and terminated his employment on 20 May 05. He was hired as a surveyor and spent most of his time surveying. He worked approximately six ten hour days per week, and eight hours on Saturdays. Claimant had worked on bridge projects before, and they require a lot of concrete. When he arrived on the job site, the permanent bridge structure was already up.

Caissons are placed in the river bed and protrude from the water. Piers 37 and 38 were mainstay construction piers that were built on caissons. They are the cable-stay constructions of the actual road deck. Towers are built above the piers.[25] Piers 37 and 38 were identical. Claimant was injured on Pier 38 when he was in the process of installing a bow tie form above the two shoring towers. The bow tie form was being erected to install the bow tie, which is a concrete tie between the two towers at a strategic point of elevation that locks the two structures in. It is essentially a brace made of concrete, shaped like a bowtie. The temporary shoring tower was there to hold the forms while the brace is being poured, all of which was between the two towers on Pier 38.

Construction materials were delivered to Pier 37 and 38 by boat or barge. There was no roadway there when he fell; the only way of access to Pier 38 was by a river vessel. Materials were unloaded at Pier 38 by barge cranes and a tower crane. The tower crane was attached to the actual tower itself; there were two vertical black towers, one on Pier 37 and one on Pier 38, centered between two concrete towers.[26] Construction materials were unloaded on Pier 38 daily by barge. During the time Claimant was working there, approximately 12-18 barge-loads were unloaded at Pier 38 on a daily basis. The most prevalent materials unloaded at Pier 38 were construction materials and concrete, but concrete was not unloaded every day at Pier 38.

[24] Tr. 32-116; 196-201.
[25] See picture in CX-8
[26] Id.

There were between 1 and 10 barge-loads of other materials unloaded at Pier 38, including steel reinforced cages. These are used to construct the actual vertical tower in sections, one on top of another. The cages were put in place and then forms were put around the cages. Then concrete was poured to form the walls of the tower. Cages included one of the major materials unloaded at Pier 38. Other construction materials unloaded at Pier 38 included scaffolding, plywood, two by fours, two by sixes, and other miscellaneous construction equipment.

Claimant's primary duty was that of a rod-man on a survey team. His other duties included assisting in the loading and unloading of concrete into barges that had concrete buckets. There were three docks at the location, a material dock, an engineering dock, and the concrete dock. At the material dock, all other materials except concrete were loaded and unloaded. The engineering dock was for personnel to carry out their duties.

Claimant worked at the concrete dock, where he loaded concrete onto barges two to three times per week. He loaded concrete at the loading dock two to three times a week, each instance taking from seven and a half to ten hours. Toward the end of his employment, he was given other assignments on concrete loading days, near the time he left to see the doctor. He was given two other assignments within the last two weeks of his employment. Aside from that, he worked every loading day at the concrete loading dock until the last barge left.

Claimant's main function during concrete loading days was to coordinate between the hopper operator and the truck driver, who could not see each other. The concrete was in a concrete truck that was poured into a hopper. A hopper is a container that resembles a garbage receptacle that is square, like a small dumpster, except that it is tapered at the bottom with a trap door. It is open at the top. Concrete came in a truck and was poured into the hopper. The hopper trap door permitted concrete to flow out into an elephant trunk. The elephant trunk was made of segments of round tubing, like metal material in segments. There was a hopper on the concrete deck and it went through the elephant trunk into a barge that was floating on the river level.

The concrete was placed into the buckets with the trap door. There were ordinarily four buckets on the barge and between six and eight cubic yards of concrete in the trucks that is delivered to the loading dock. During Claimant's employment period, only one truckload of concrete was loaded into the barge. The concrete truck spins in a clockwise motion that forces the concrete to the concrete shoot. The hopper is on the dock, beneath which there is a trap door that opens and allows the concrete to go through a chute. The chute goes into the bucket.

Claimant coordinated between the hopper operator, the truck driver, and the boat paddler. He also received and signed every receipt from the truck driver. He would take the receipt from the truck driver, tear off the top part and gave the truck driver back his three copies; his copy was placed neatly on his plastic clipboard, which was covered in plastic to protect it from rain. The process took about a minute. Receipts would accumulate during the course of the loading day. At the end of the day, Claimant would deliver these receipts to Keith Edwards.

It would take approximately five minutes to load a barge containing one truck load of concrete, perhaps longer, depending on factors such as the weather and waves. Generally, there was not a lot of talking, motioning, hand motions or signaling; it was a very quick process and people knew what they were doing. The number of barges normally loaded during the course of a work day would vary from 12 to 18. The normal time interval between loading cycles would be between 25 and 30 minutes. The loading cycle is the time between the time a barge arrives to be loaded and the next barge arrives to be loaded. Claimant had certain duties concerning the pouring concrete out for a sample. He was to look at the concrete for viscosity. It would take approximately five to ten minutes to get from the middle of the river to the loading dock.

The concrete loading operation was supervised by Keith Edwards. He would check the concrete for viscosity, and would usually be absent after that. He was at the site every time the truck initially deposited the sample of concrete into the hopper and then into the barge. Edwards was absent daily from the operations, usually for two to four loading cycles. His participation in the loading process, other than to check the viscosity, would be to intervene if a something went wrong in the process, or if it was taking too long.

Edwards gave Claimant loading instructions. The initial instructions were given at the concrete dock on his first day of employment. Edwards introduced Claimant to the compressor and generator and described how the system had to be filled with oil and checked for diesel fuel, in addition to walking Claimant through the mechanics of the system of the hopper, how it used air and how it used a high pressure water hose. Edwards instructed Claimant on how to operate the motors, and informed him that the day before a pour he would have to fill up the motor with diesel and check the oil so it would be ready the next day at 7:00 a.m. to begin work. There was a maintenance crew available to service the motors, but Claimant had to perform these checks because often the maintenance crew would put the diesel in the big tank or wouldn't fill the generator, so he needed to make sure it was filled. It was Claimant's responsibility pursuant to Edwards' instructions to see to it that these things were serviced the day before the loading day.

On his first day of employment, he was also instructed on how to clean out the hopper and how to clean the hopper trap door and when to do each. This was demonstrated by Keith Edwards. Claimant was instructed to clean the hopper top. Concrete was placed in it and the truck left in between the loading cycles, at which point he was to clean it, and give the hose to the hopper operator and watch him clean that. At every fourth truck, Claimant was to get him to open the trap door and give a thorough cleaning. It was custom to clean the hopper every time the barge left the port. Ordinarily, Claimant would clean the top of the hopper, and the hopper operator would clean the bottom, except every fourth load, the Claimant would open the trap door and clean it thoroughly.

On the day of the first pour during Claimant's employment, Keith Edwards instructed claimant to watch what he did for one truck loading one barge. Edwards showed Claimant where to stand and who to talk to – the hopper operator, the truck driver, and the boat captain. Edwards told Claimant that from that position, he could do all three things by coordinating and giving them hand signals and voice commands. From that point on, Claimant performed those duties.

Edwards instructed Claimant to assist the truck driver by standing on the corner of the stop block where he could see himself in the truck driver's mirror. Edwards said to just motion to the truck driver to come back, and to be cautious of new truck drivers who might veer off the path. Claimant was instructed to serve as a guide for the truck driver backing the truck out and to receive and sign concrete receipts for every truck.

Edwards performed a visual viscosity check on the concrete. He showed Claimant how to do this and what to check for, including quality, lumpiness, and dryness. He was told to stand in the middle of the hopper next to Edwards so he could instruct him on how to keep the quality right because it is critical that it be mixed thoroughly and be the right consistency. Edwards would solicit Claimant's opinion at least every other time regarding the viscosity of the concrete. When viscosity is tested on concrete, it must be sent to a lab to have the actual viscosity tested. Claimant was not involved with any lab testing of viscosity. A load was never stopped so it could be sent to the lab. In addition, Claimant would make sure the barge was in the right location so that when the trap door opened, it would hit the center of the bucket. If it was off center, he would fix it in coordination with the boat captain, and the hopper operator.

Claimant performed these duties approximately two to three times per week throughout his employment, both before and after his injury. Up to the time of the injury, Claimant would spend at least two and sometimes three days a week on the hopper observing, overseeing, signaling, and directing the transfer of concrete

from the truck to the hopper down into the barge. Edwards also gave Claimant instructions on how to coordinate the tow boat. Although most of the tow boat operators were competent and did not require instruction, there was one that did, usually involving stern hand signals as to when to back off the engines.

The type of instructions for the boat captain was hand signals and voice command, based on how much pressure they are putting on the cable and how to keep them focused on what the process was to make it go fast. Signals would be made standing at the plywood railing in order to put the barge in position so it would be aligned with the bucket below the elephant trunk. If it was not aligned, he would inform the hopper operator. By assuring that the barge was aligned with the bucket, Claimant assured that the process would be quick and not waste concrete.

Claimant was also instructed to wet down buckets if they were dry. This was done about 80% of the time. Edwards instructed Claimant on how and when to wet down the buckets. Claimant would give the order to the truck driver to roll his load out, and he would proceed to quickly put the concrete into the hopper. The hopper would go straight through the trap door and fill the bucket. The signal for rolling out the concrete used by the Claimant was turning his finger clockwise above his head, with the voice command, "roll it out". The signal for stopping would be a clenched fist with a voice command of "stop" or "whoa". Claimant would give the order to stop. The hopper operator would close the trap door, and Claimant would gauge the concrete as it was coming into the hopper to keep it from becoming too full. The truck driver would stop and the boat would move forward for the second bucket.

Claimant also assisted the winding of the cable after the boat or the cable was released from the barge. Edwards told him to stand there and watch the cable as it was being reeled in, making sure that it wasn't pulled through the stop block. Claimant would give a signal about five feet before it popped out of the water. Claimant would observe the cable through the steel mesh grate.

Claimant observed the lumpiness of the concrete, in accordance with instructions given by Edwards on the first day of loading. Edwards said to watch it for lumpiness and to maintain that process assurance all the way through the loading process. If the concrete looked too lumpy or dry, Claimant would instruct the truck driver to spin the load more thoroughly. Claimant constantly observed the concrete in the hopper, at the bucket, and as it came out of the shoot into the hopper.

CX-13 is a DVD that shows Claimant, Edwards, and a safety inspector on the hopper concrete dock deck.[27] It shows the process of aligning the hopper with the bucket, with Claimant on the deck assuring the alignment of the machinery, and simultaneously checking the viscosity. Claimant is wearing a yellow hard hat indicating that at the time the video was filmed, he was still within his first thirty days of employment. The video shows Claimant communicating with the truck driver[28] regarding the amount of concrete he has and his location. The video shows Claimant on top of the hopper communicating with the truck driver, while Edwards stands next to the water cooler[29]. Claimant is shown in the center of the plywood where he can see the hopper operator, the boat operator, and the truck driver, in addition to the concrete. The video shows Claimant with his hands in the air making hand signals to the incoming barge. While Claimant is doing this, the video shows Edwards casually walking.[30]

On 4 Apr 05, he was injured while working for Employer at Pier 38 on a temporary shoring tower, several hundred feet in the air. His task was to survey the four corners of the devices above the temporary shoring tower for a line and grade location. Claimant was standing on an I-beam approximately three feet above a plywood platform on top of the tower. Because there were no scaffolding stairwells to the top of the temporary shoring tower, Claimant was hoisted there by a monster barge crane.

The tower crane is attached to the pier. The outside vertical arms of the tower and the lower base are permanent parts of the bridge. On top of the tower crane tower is the tower crane. It remains the whole time the facility is being built. It is attached to the white base that is the permanent bridge structure. The temporary shoring scaffolding towers are attached to the permanent bridge frame for a limited duration.

In his position on the temporary shoring tower, Claimant had in his possession a survey prism rod, a radio walkie-talkie. He was wearing a life jacket, full body harness, and hard hat. He used the radio to communicate with his boss, Keith Edwards, who was chief surveyor. Claimant's duties included rodman on a survey crew to take survey shots.

Claimant was injured on Pier 38 as he was standing on top of one of the yellow towers[31] to take a survey shot. As Claimant was trying to descend from one I-beam onto another he lost his balance and fell. The fall was witnessed by a

[27] CX 13, 3:03, 3:12; Tr. 86-97.
[28] Id. at 44:42.
[29] Id. at 6:59.
[30] Id. at 8:35 – 9:05.
[31] See picture in CX-8.

construction helper and Keith Edwards. Edwards stopped the crew when he witnessed Claimant fall and asked if Claimant was injured. Claimant informed Edwards that he needed to catch his breath, but believed he would be fine. Claimant waited a couple of minutes and then continued the survey of the four corners. He was hoisted back down to the monster barge.

Keith Edwards testified at trial in pertinent part that:[32]

He works for Employer and in April of 2005, was Claimant's supervisor at the Greenville Bridge Project. Edwards was a surveyor and gave locations and elevations where all the concrete structures were built. At the time of Claimant's accident, Edwards was on land on a control point looking through a survey instrument, taking shots on a shoring tower to line it up. Edwards was aware that Claimant was on the shoring tower, at the top of the scaffolding tower. At the time of the work accident, Pier 38, where the accident occurred would have looked similar to Pier 37.[33] Claimant was approximately a hundred feet up from the road deck. The white base and arms of the tower are part of the permanent bridge structure. The shoring tower and tower crane are attached to the bridge structure. The top of the road deck from which Claimant fell was approximately 180 to 200 feet above the water level. Edwards did not actually see Claimant fall. He looked up to take a shot, looked down to record it, and when he looked up again to take another shot, he did not see Claimant. Edwards then called Claimant on the radio to check on him, and Claimant responded that he was alright.

On a daily basis, materials were being moved from barges onto Pier 38. Barges were unloaded on Pier 38 by either the tower crane or the barge cranes and deposited either on the pier itself or at some place on the structures being constructed on the pier.

Edwards and Claimant were basically a surveying team. The bridge piers must be in an exact location. There have to be points laid out from which to start, and then the workers and carpenters go in and set up forms. The surveyors then go back and recheck them. That was Edwards' primary job, although he did engage in other activities.

Other activities that he and Claimant engaged in were the concrete dock duties. Edwards was to watch everything that went on, including, but not limited to checking the consistency of the concrete. As a supervisor, he also watched for river traffic coming or obstructions that might get in the way and just generally

[32] Tr. 117 - 194.
[33] CX 8

observed to make sure that everything was done correctly and safely and that no one got hurt.

When he was available, Edwards had general oversight of the concrete loading process. Claimant was primarily there with him. He took tickets for Edwards to keep him from having to take them. In Edwards' absence, the process would continue, but they would not rely on Claimant to do similar activities. Edwards estimates that he spent about 10-20% of his time on the concrete dock overseeing operations. He never gave signals to boats. During this time, Claimant's job was primarily to take receipts, and he would do other insubstantial tasks.

There was not necessarily someone who was supposed to be directing and coordinating between the tugboat captain, the hopper operator, and the truck driver. If it was necessary, it was usually Edwards who did it. It was not Claimant's job to direct the truck. It was Edwards' responsibility to instruct Claimant to issue commands and directions to the hopper operator and the truck driver. It was not Claimant's job to do so, and if Edwards was there to perform such tasks, he did. The system took care of itself. The tug operator was sitting right above the bucket. The boat came in, was hooked up with the cable, and the boat captain controlled the boat. He just barely pushed ahead on the boat enough that the brake could hold it. The tug operator released the brake until the bucket was directly beneath the shot and then he applied the brake again. Once it was there, he dumped the concrete. The concrete could be dumped in the hopper and left in the hopper before the boat even got there. The hopper operator was a laborer trained on the job to operate the winch. He stayed on the dock and opened up the hopper with the concrete to come in. As long as the hopper was closed, the concrete was not coming in, so he would know when the barge was in the right spot for the hopper to be opened.

To test the viscosity at the site on a project, they used a slump test, an air entrainment test, and a yield test. These tests were not done on the dock. They had an engineer assigned and worked in what they called the Q.C. Trailer, which was down at the bottom of the hill from the dock. The trucks would go there before they came to the dock and do a slump test on a sample of concrete. They also did an air entrainment test and a yield test. Those tests were done by an ACI certified engineer within the company. The tests were taken and cylinders were made before the concrete got up to the concrete dock. If there was a problem with the concrete, it was weighed and every increment of water, cement, sand, and admixture was measured. This information was relayed back to the plant when the first test truck arrived, and the problem was corrected there.

It was the engineer's job to make sure that the concrete met the specifications for the project. It was not Edward's job to test the viscosity of the cement as it is being poured into the hopper. It was only his responsibility to not let a truck through that gets loaded incorrectly or is not mixed correctly. It was not Claimant's job to test the concrete, because that required a special engineer. Claimant was not a specialized engineer; he was a surveyor. The process of backing the trucks up onto the loading dock took care of itself, because there were two runners for the tires and timber at the end. When the tires touched the timbers, they could not go any further. The truck drivers just backed up until they hit the timber. The main task on the concrete dock was to take tickets and stay out of the way. The truck drivers did not need help. They backed up until they hit a defined line. When the concrete is poured depends on the work schedule; they try to predict it ahead of time.

In the month before his accident, Claimant did not go to the concrete loading dock two or three times a day and stay ten hours all day long, assisting in the loading of the barges with concrete. During Claimant's employment period, they were pouring towers which were small pours, less than a hundred yard pours that did not require much attention. The primary job was to survey and they were not on every concrete pour. Surveying work came first and concrete quality control supervision came second. If there was a concrete pour scheduled or they were going to pour concrete and a survey needed to be done, an engineer would take responsibility of the concrete dock.

Edwards estimates that in the four weeks prior to the accident, Claimant was on the concrete dock approximately 5% of the time. Claimant's responsibilities on the concrete dock included taking tickets. There was a folder and Claimant would take the tickets; both Edwards and Claimant would sign them. This allowed the people on the water to tell how much concrete was poured and how much was needed.

The time spent pouring concrete on the concrete dock varied greatly. There was only one big pour that was made during the three to four week period prior to Claimant's injury. When the concrete was being poured, Edwards might go down to the Q.C. Trailer and ask them questions and come back up, but usually not when there were trucks present. Normally, when the trucks were there, Edwards was there as well. There was a crew of mechanics that would be called if there were problems with the air compressor. It was normally the hopper operator's job to clean out the hopper. The hopper cannot be cleaned with a barge sitting underneath. Very rarely, Edwards would clean out the hopper. Edwards has no recollection of Claimant ever cleaning out the hopper. Edwards only recalls that Claimant's assigned responsibility was receiving and signing the tickets which are concrete receipts.

Edwards does not recall Claimant having any other duties on days when they were loading concrete at the concrete loading dock. Generally, he was idle except for that period of time when he was signing tickets. It would only take a minute for Claimant to sign and put up the tickets. It would also only take a few minutes to load a truckload of concrete onto the barge. Claimant stood on the concrete dock in an area on the downstream side of the concrete dock where there was no danger of getting hit by a shoot. Claimant did not stand on the other side because there are a lot of trip hazards on that side. Claimant stood on the hopper deck during the loading process, even though he was not part of the loading process, because that is where the clip boards used to collect tickets are kept. Edwards never informed Claimant that it was his responsibility to see the generator motor was serviced before loading days, because that duty belonged to the maintenance crew. Occasionally, Claimant, with Edwards, might have put fuel in the generator motor. Edwards does not recall Claimant ever performing this task on his own, nor does he recall taking Claimant the first day before the loading day and showing him how to service and operate the generator motor and how to properly clean the hopper. Edwards never told Claimant it was his responsibility to supervise the cleaning of the hopper every fourth time.

Claimant was not present at the time when concrete was poured into the bottom of the bow tie strut on Pier 37. It is possible that he was there when they poured concrete into the top of the bow tie strut on Pier 37. Approximately 147 cubic yards of concrete were poured; this was not considered a big pour, which would be closer to two thousand cubic yards. How many hours were spent on a pour day depended upon temperature, the size of the form, the amount of concrete, and the rate of the pour. Although they had the capacity to pour 180 yards per hour, they did not necessarily pour 180 yards every hour, because different pours take different times. A normal tower pour lasted a couple of hours, pouring about 96 yards. On the days that concrete was poured at Pier 37, it took two hours to pour ten cubic yards, and two hours elapsed between the first and second truck loads[34]. The cumulative yardage poured on March 15th was 704 yards[35]. The total yardage delivered was 104 cubic yards.

Edwards was usually required to survey everyday, and Claimant was generally with him. It was extremely rare for Edward to work all day on a construction dock. If he was on the construction dock with Claimant, and had to leave the dock to engage in surveying, he would take Claimant with him, because surveying cannot be done by one person alone.

[34] CX 6
[35] Id.

During Claimant's employment, the trucks delivered different size loads, including six yard loads, nine yard loads, and eight yard loads. CX-6 demonstrates that 16 truck loads would take approximately eight hours, which is the bulk of the work day. Someone must always be on the dock during this time, although it wasn't always himself and Claimant. When Edwards and Claimant were surveying, which they did every day, someone else would be on the dock. Surveying could not be put off until the concrete loads were finished.

If there were six yards of concrete in a truck, it would usually be broken down by putting three yards each in two buckets. A loading cycle is the time that the barge is at the dock, ready and starting to be loaded until the next barge comes and is ready and starting to be loaded. The fastest this could be done is approximately four minutes. Edwards does not recall instructing Claimant to test the concrete for viscosity, nor does he recall doing it himself. This is a process that is done in a lab. Edwards would check the concrete as it flowed into the hopper for consistency. He had the authorization to add small amounts of water to adjust the consistency of the concrete, but it was usually done by the workers at the concrete plant.

Edwards never instructed Claimant to direct the boat captain in by hand signals into position when the boat was returned or to assist the hopper operator in the alignment of the bucket under the elephant trunk. Neither Edwards nor Claimant were responsible for giving instructions for when to stop filling the buckets because the hopper operator was in the best position to make that call. The bucket-man on the barge had a two-inch pump and keeps the buckets wet. Under rare circumstances, another person on the loading dock would wet down the buckets. The bucket-man also cleaned out the buckets after they were emptied at the work site. The bucket-man was on the pontoon with the buckets; there were two people on a boat and one person on a pontoon. The workers on the loading dock would wet the buckets instead of the bucket hand if the pump on the barge happened to run out of gas or broke down.

Roy Johnson testified at deposition in pertinent part that:[36]

He was employed by MMC for thirteen years. He was a truck driver and delivered concrete to Employer for the entire time that they were involved with constructing the Greenville Bridge. He knew Claimant from working with him on the loading dock.

[36] CX-4.

He would begin delivering concrete to Employer at around seven in the morning, and run for between ten and fourteen hours each day. They did not deliver everyday, and there were days that the deliveries only took a couple of hours. The smallest volume they delivered was 400 to 450 cubic yards. Each driver probably ran fourteen or fifteen loads. Sometimes Employer would pour a thousand yards a day.

All of the concrete was taken to the loading dock. The truck drivers would take receipt tickets with them when they took a load. The ticket recorded the time the concrete was loaded on to the truck, the time they arrived, the time they unloaded the concrete, and the time they returned to the plant. A round trip would take approximately fifteen minutes.

He worked with Claimant. Claimant worked on the loading dock, signing tickets, and signaling to the truck drivers when to unload. Claimant would stand at the hopper when the truck drivers were backing up to the ramp. Both he and Keith Edwards would occasionally assist them. Claimant would sign the tickets from the truck drivers in addition to signaling to the truck drivers when they were loading or putting concrete into the hopper. He would use signals such as circling his index finger above his head to indicate to the truck drivers to roll out the concrete. Claimant also was responsible for washing down the hopper every 25 to 26 loads of concrete; otherwise, it would build up in the hopper and choke up the bottom. This would be done four to five times throughout the day. Claimant also wet down the buckets before any concrete drop.

Everyone who worked on the loading dock did essentially the same thing. There was another individual, a tall white male, who performed Claimant's duties before Claimant was hired. A female replaced Claimant after he terminated his employment. She had the same duties as Claimant, including signaling, signing tickets, washing down buckets, and cleaning the hopper. She also operated the hopper.

He does not get paid if he has to go to court to testify, and the $40 witness fee would not compensate him adequately for the time lost. He drove to the deposition with another witness who is also his co-worker. They did not discuss the case or what was going to be asked in the deposition. He spoke with Claimant's counsel on the phone on one occasion before the deposition. They discussed similar issues that were discussed in the deposition. They never met in person.

Darrin Davenport testified at deposition in pertinent part that:[37]

He is employed by MMC Materials. He does not get paid if he is called to appear as a witness in a court or administrative proceeding. He has worked for MMC for six years, and was involved with the furnishing of concrete to Employer when they were building the bridge. He was involved with the bridge construction project from the beginning and is still presently working on it. He has been delivering concrete the entire six years he has been working with MMC, and has been delivering concrete to the bridge project that entire time. Nine yards is the maximum he carries. When he delivers a load of concrete to anyone, he has a receipt that he furnishes to whomever he is supplying the concrete to. That receipt records the time and the date that the concrete left the plant.

When concrete was delivered to Employer, it usually came from two different plants. One was located in Greenville, MS, and the other in Lake Port, AK. It would take approximately 5 minutes to deliver the concrete from the Lake Port plant, and thirty to forty minutes to deliver concrete from the Greenville plant. The plants are recorded on the receipts at the time the concrete is batched into the truck.

He worked with Claimant for approximately three months in 2005 and knew Claimant as the employee who signed the tickets and backed the trucks up to the ramp at loading dock, where the concrete was delivered. He would begin to make deliveries to the loading dock anywhere between seven and eleven in the morning. The loading process, from the time the first truck arrived until the last truck left or emptied its load at the loading dock, took approximately eight to ten hours.

When the concrete was being put into the hopper from the truck, he would be on the left-hand side operating the truck. He was outside the truck on the rear left side where all of the controls were. There, he operated the controls and controlled the flow of the concrete into the hopper, slowing it down, speeding it up, or stopping it completely. Claimant would use hand gestures to signal to him to spin the load to break down lumps in the concrete and even it out. The process of unloading the truck took no more than five minutes without interruptions. It was during this five minute period that the he saw Claimant throughout the day at an average of ten to fifteen times per day. He does not know what Claimant did at other times during the day.

He observed Claimant guide the truck back to the bucket, and take the tickets and sign them. Claimant would assist in backing the truck up to the hopper. The hopper is a large bucket in which the concrete is poured and from which the

[37] CX-3.

concrete is poured down into the barge, through a trap door at the bottom. He required guidance and assistance when he backed his truck up to the bucket. If Claimant was not there to aid him, then another person would have to do so. After Claimant signed the ticket, he would let the truck drivers know when to let the concrete go in the hopper. He would do this by using hand signals. Claimant received a signal from the hopper operator, and would then relay it to the truck driver. He saw Claimant regularly guide the trucks into position, sign the tickets, signal the truck drivers, wash the hopper, and wet down the buckets.

Keith Edwards was the supervisor of the dock. He was there sometimes when the concrete loading took place. He was not always present when Claimant was assisting in loading the concrete into the barge. Edwards drove a white truck that was parked on top of the dock ramp. Sometimes two trucks could load the barge at the same time. However, when Edwards' truck was parked on the ramp, only one truck could unload.

After Claimant terminated his employment, a female replaced him in his position. She performed the same functions that Claimant did. Prior to Claimant's employment, his job was performed by another man.

The Greenville Bridge Website states in pertinent part that:[38]

The original Greenville Bridge was constructed in 1940 and had a main span of 840 feet. In the past sixty years, the bridge has endured increasing volumes of highway and river traffic. Though the 1940 Greenville Bridge is structurally sound, the bridge is considered functionally obsolete by modern standards. Its total roadway width is 24 feet with no shoulders. It has an overall sufficiency rating of 47.5 from the Federal highway Administration, making it eligible for replacement funding. The sharp vertical crest of the bridge reduces sight distance far below current criteria required by the Mississippi Department of Transportation. Finally, the location of the bridge makes it highly prone to marine vessel collisions. Since 1972, it sustained more barge collisions than any other bridge on the Mississippi.

In 1994, the Mississippi Department of Transportation (MDOT) issued an engineering study report that explored a four-lane crossing for US 82 at Greenville. The study identified three construction alternatives that would accomplish the goal: two alternatives called for building new bridges and removing the old bridge; a third alternative explored keeping the old bridge and building a new bridge immediately next to it. It was concluded that a new bridge

[38] CX-10-12.

should be located approximately half a mile down river from the old bridge, and that the old bridge should be removed.

The new bridge has 2 ½ miles of bridge deck, two concrete towers at 425 feet above the Mississippi River, concrete piers anchored 120 feet into the riverbed, and four fans of pre-stressing strand steel cable. The bridge has a significantly greater amount of roadway in both the Mississippi and Arkansas approaches to the bridge. It is located 2800 feet downstream of the old bridge to decrease the likelihood of barge collisions. It will have four lanes of traffic, each twelve feet wide, with a twelve foot outside shoulder and an eight foot inside shoulder.

A Mississippi State Legislature Resolution states in pertinent part that:[39]

It supports the passage of legislation authorizing such funds as may be necessary to provide for the construction of a new four-lane bridge across the Mississippi River at or near Greenville, Mississippi. The current bridge is considered a serious navigational hazard and a feasibility study has been completed that calls for the construction of a new four-lane span bridge on US 82.

An engineering journal extract states in pertinent part that:[40]

The 1940 bridge has been struck by more barges than any other bridge over the lower Mississippi River. Between 1972 and 1995 there were a total of 100 barge collisions on the lower Mississippi and Arkansas Rivers. The 1940 Greenville Bridge accounts for 39 of those collisions. One of the primary reasons for the large number of collisions at the existing Greenville Bridge is its location relative to an upstream bend in the river. The navigation opening is located on the east side of the channel and in order to transit the opening, the pilots must begin maneuvering far in advance of the bridge. With up to 1,500 feet of barge out front and one of the swiftest currents along the entire river, managing control of the vessel becomes difficult. As the operators attempt to line up for the bridge, the current drives them toward the Arkansas bank of the river and toward the westernmost main pier.

A DVD shows in pertinent part that:[41]

Claimant is working aboard the concrete loading dock. He is standing beside the concrete truck observing the concrete flow into the hopper. Keith Edwards and another individual are on the dock with him.

[39] CX-13.
[40] CX-14.
[41] CX-9.

MCM Records show in pertinent part that:[42]

The following concrete deliveries were made the bridge site:

Date	Number	Approx. Times
15 Mar 05	17	7 AM - 3 PM
16 Mar 05	2	9 AM - 11 AM
18 Mar 03	19	6 AM - 3 PM
23 Mar 05	16	7 AM - 5 PM
29 Mar 05	16	7 AM – 3 PM

ANALYSIS

There was significant dispute as to only one major factual issue in this case, the extent to which Claimant assisted in the process of unloading concrete trucks into barges. The record contains conflicting evidence on that question.

The record shows that Claimant was employed for the 22 days before he was injured. During that time, there were five days of concrete deliveries and on four of those days deliveries lasted the majority of the day. Thus concrete deliveries were taking place approximately 20% of the time Claimant was employed.

Although Claimant was hired as a surveyor, he testified that he spent every concrete loading day on the dock. He stated that his duties there consisted of: (1) collecting and signing receipt tickets from the truck drivers who were delivering concrete; (2) aiding the truck drivers in backing up the trucks to deposit the concrete into the hopper; (3) signaling the truck drivers of when to roll out the concrete, when to stop pouring, and when to spin the load to even out lumps in the concrete; (4) washing down the hopper after a certain number of loads; and (5) wetting down the buckets for the concrete.

Conversely, Claimant's supervisor, Keith Edwards, testified that Claimant spent the majority of his time with Edwards, engaged in surveying activities. Edwards stated that when they were on the concrete dock, Claimant's sole responsibility was to collect and sort receipts from the truck drivers. Edwards added that he never instructed Claimant to become involved in the loading process, nor did he ever witness Claimant involving himself in the loading process.

[42] CX-5-6.

However, Claimant's testimony is corroborated by the testimony of two truck drivers, Darrin Davenport and Roy Johnson. They testified that they witnessed Claimant engaging in the five activities that he described in his testimony. The DVD also shows Claimant monitoring the unloading of the concrete into the hopper, which allows it to flow onto the barge. Moreover, Edwards testified that Claimant collected tickets, and that they spent up to 20% of their time on the dock.

As a result, the weight of the evidence is that Claimant was employed to help conduct survey sightings in the construction of a bridge over a navigable water. However between 15 and 20 % of his time he was engaged in assisting concrete truck drivers unload concrete into a barge. He not only took tickets, but also signaled truck operators, and cleaned out the loading equipment.[43] At the time of his actual injury, he was engaged in his survey work on a structure arising out of the river that would ultimately become a main bridge tower.

Situs

In order for Claimant to be covered under the Act, he must first show that his injury occurred over navigable waters (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)"[44]. Completed bridges are generally considered to be permanent fixtures that are extensions of land, and thus not within the coverage of the Act[45] However, the same is not true of bridges under construction.[46] They may be considered as still over navigable waters.

In this case, Claimant was injured while standing on an I-beam on top of a tower crane, which is attached to Pier 38. Construction was not complete on the bridge. At the time of the injury, there were only two large towers erected as a base for the bridge. Claimant was injured on these unfinished fixtures. Although the bridge will eventually be considered an extension of land, and not navigable waters, at the time of injury, the bridge was still under construction, allowing Claimant to meet the situs requirement. The instant case is analogous to those cases in which the court finds the situs requirement met because the injury occurred on an uncompleted bridge under construction.

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[43] Even if Edwards' testimony was accepted as correct and Claimant's activity was limited to collecting tickets, it would still constitute an integral part of the loading and unloading process. The ultimate result would be the same.

[44] 33 U.S.C. § 903.

[45] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329, 333 (1992).

[46] *LeMelle v. B.F. Diamond Construction Co.* 674 F.2d 296 (The bridge in this case was under construction and thus claimant's injury on a piling in the river was on actual navigable waters), *Johnsen*, 25 BRBS 329,*(*Claimant performed manenance upon a completed bridge, which is therefore an extension of land and not within coverage of the LHWCA*); Kehl v. Martin Paving Co., (*BRB No. 99-1154)(Unreported)(Aug. 10, 2000)(Bridge in use for highway traffic over Intracoastal Waterway was permanently attached to land, and therefore was not a covered situs).

Pier 38 also satisfies situs because it received loads of concrete from barges, which were unloaded and used to construct the bridge. The Act grants coverage for injuries that occur on any "adjoining area customarily used by an employer in loading [and] unloading … a vessel."[47] Claimant was injured on Pier 38 which is customarily used by Employer to unload concrete from barges.

In sum, Claimant satisfies the situs requirement of the Act. His injury took place in a location that was over navigable waters and customarily used for loading and unloading vessels.

Status

The remaining issue is whether Claimant was sufficiently involved in the loading and unloading of a vessel to satisfy the status requirement. Given the factual finding that Claimant duties included spending between 15 and 20 % of his time assisting concrete truck drivers unload concrete into a barge, there is little question that Claimant's performance of longshore activities was far beyond momentary and episodic.

DECISION

Claimant's injury of 4 Apr 05 falls within the coverage of the Act.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

[47] 33 U.S.C § 903(a)